No. 89-764

In the Supreme Court of the United States

OCTOBER TERM, 1989

DAVID G. RAWLS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, before March 23, 1988, a conviction for the distribution of 3, 4-methylenedioxymethamphetamine in violation of 21 U.S.C. 841 (1982 & Supp. V 1987), as incorporated by Clause 3 of Article 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 934, was preempted by Article 112a of the UCMJ, 10 U.S.C. 912a, which makes it a crime for a servicemember to distribute controlled substances.

2. Whether 21 U.S.C. 813 (Supp. V 1987), which permits a "controlled substance analogue" to be treated as a "controlled substance" for purposes of establishing an offense under Title 21 of the United States Code, is unconstitutionally vague.

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OPINIONS BELOW

The opinion of the Air Force Court of Military Review (Pet. App. 1a-6a) is unreported. The opinion of the Court of Military Appeals (Pet. App. 7a-8a) is reported at 29 M.J. 323.

JURISDICTION

The judgment of the Court of Military Appeals was entered on September 29, 1989. The petition for a writ of certiorari was filed on November 14, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3) (Supp. V 1987).

STATEMENT

Following a general court-martial at Bergstrom Air Force Base in Texas, petitioner, a member of the United States

Air Force, was convicted of using cocaine, methamphetamine, and lysergic acid diethylamide (LSD), in violation of Article 112a of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 912a (Charge 1); of using and distributing marijuana, cocaine, methamphetamine, LSD, and 3, 4-methylenedioxymethamphetamine (MDMA), in violation of Article 112a, UCMJ, 10 U.S.C. 912a (Charge 2); of stealing government property, in violation of Article 121, UCMJ, 10 U.S.C. 921 (Charge 3); and of possessing cocaine, in violation of Article 112a, UCMJ, 10 U.S.C. 912a (Charge 4). Petitioner was sentenced to confinement for 20 years, a reduction in rank, forfeiture of all pay and allowances, and a dishonorable discharge. The convening authority reduced the period of confinement to 15 years but otherwise approved the findings and sentence. The court of military review affirmed petitioner's conviction and sentence. The Court of Military Appeals reversed the specification charging petitioner with the use of MDMA, modified the judgment,[1] and otherwise affirmed.

1. In 1987, the Air Force Office of Special Investigations (OSI) received information that petitioner was involved in narcotics use and trafficking. In mid-July of that year, with the assistance of Airman Kelley Ferkler, the OSI purchased methamphetamine from petitioner. Tr. 234-243, 251-257; PXs 10, 11, 20. After he was arrested, petitioner prepared a signed and sworn statement in which he admitted that he had frequently used and distributed narcotics.[2]

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[1] The court changed the specification charging petitioner with the distribution of MDMA from a violation of Article 112a, UCMJ, 10 U.S.C. 912a, to a violation of Article 134, UCMJ, 10 U.S.C. 934. Pet. App. 7a-8a.

[2] Petitioner admitted that he had used marijuana two or three times per week during the previous two years, that during the previous year he had used methamphetamine on a number of occasions, that he had

Petitioner also provided a urine sample for drug testing; the tests disclosed the presence of the marijuana metabolite. Tr. 198, 272; PX 7. A search of petitioner's apartment led to the discovery of various items of drug paraphernalia as well as items that had been stolen from a military dormitory. Tr. 211-216, 221-226; PXs 21-29. Testimony at trial showed that petitioner had extensively used and trafficked in narcotics.[3]

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used cocaine two or three times, and that he had used LSD and MDMA three or four times. He admitted once selling marijuana to Airman Hohensee, once selling methamphetamine to Airman Ferkler, and selling methamphetamine to Airman Robert Shamblin about five times. Petitioner denied selling any drugs to Airman Anthony Ciura. PX 12.

[3] Airman Ciura testified that he used marijuana with petitioner on possibly more than 100 occasions. Tr. 291. Petitioner sold marijuana in Ciura's presence 15-20 times to Ciura, to other military members, and to local high school students. Tr. 295. Ciura witnessed petitioner inhale methamphetamine 15 to 20 times. Tr. 302-303. He saw petitioner sell methamphetamine five to seven times, including three or four times to high school students. Tr. 305-306. Petitioner also shared methamphetamine with others at no cost on 15 to 20 occasions. Tr. 310. Ciura saw petitioner use LSD four or five times. Tr. 311. He saw petitioner sell LSD two or three times, including once to a student. Tr. 315. Ciura witnessed petitioner smoke marijuana after the date petitioner had been apprehended by OSI. Tr. 321.

Airman Ferkler saw petitioner use marijuana 20 to 30 times, methamphetamine three or four times, cocaine twice, and LSD once. Tr. 350, 354-366. She also saw petitioner distribute marijuana, methamphetamine, cocaine, and LSD. Tr. 354, 358, 365, 367. Airman Shamblin witnessed petitioner use marijuana 50 to 100 times and sell it 15 to 20 times, including selling to students. Tr. 391-395. Shamblin saw petitioner use methamphetamine 15 to 20 times and sell it 20 to 30 times, including to students. Sometimes, petitioner would remove a portion for himself and sell the remainder for the original purchase price. Tr. 402-405. Shamblin saw petitioner use cocaine 20 to 30 times and sell it 25 to 30 times. Petitioner sold cocaine to students and sometimes

2. The questions presented in this case stem from the confluence of several federal narcotics laws applicable to the military and to civilians.

a. Before 1983 the Uniform Code of Military Justice did not contain a specific provision making it a crime to use, possess, or traffic in illegal drugs. Instead, drug offenses were traditionally prosecuted under several different sections of the Code: Article 133, 10 U.S.C. 933, which prohibits conduct unbecoming an officer and a gentleman; Article 134, 10 U.S.C. 934, which prohibits conduct prejudicial to the good order and discipline of, or that brings discredit upon, the service, or that is in violation of other provisions of the United States Code;[4] and Article 92, 10 U.S.C. 892, which makes it a crime to violate military regulations concerning narcotics. *United States* v. *Reichenbach*, 29 M.J. 128, 129-130 (C.M.A. 1989) (*reprinted at* Pet. App. 9a-32a); *United States* v. *Ettleson*, 13 M.J. 348, 358 (C.M.A. 1982).

In 1983, in order to simplify drug prosecutions in the military, Congress added Article 112a, 10 U.S.C. 912a, to the UCMJ. *United States* v. *Reichenbach*, 29 M.J. at 130

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removed some for himself. Tr. 408-410. Shamblin saw petitioner use LSD about 10 times and sell it 10 to 15 times. Tr. 412-413. He saw petitioner use MDMA about 10 times. Petitioner sold MDMA to Shamblin on one occasion and Shamblin saw petitioner give MDMA to Roanne Roberts, petitioner's girlfriend, on another occasion. He saw petitioner sell MDMA on about 10 occasions. Tr. 415-416. Shamblin saw petitioner use marijuana, methamphetamine, and LSD after petitioner was apprehended. Tr. 419-420. Two high school students, Jennifer Miller and A.J. Foulois, testified that they were present when petitioner had used and sold marijuana to high school students. Tr. 339-344, 377-384.

[4] Article 134 of the UCMJ is known as the General Article. It punishes three categories of crimes—termed Clause 1, Clause 2, and Clause 3 offenses—that are not expressly defined by other, more specific provisions of the Code. Clause 1 punishes "disorders and neglects to the prejudice of good order and discipline in the armed forces." Clause 2

(Pet. App. 11a-13a).[5] Article 112a outlaws the use, possession, or distribution of certain identified drugs (such as heroin), as well as drugs "listed" as "controlled substances" under Section 202 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (the 1970 Drug Act), Pub. L. No. 91-513, Tit. II, § 202, 84 Stat. 1247-1252 (codified at 21 U.S.C. 802(6) (1982 & Supp. V 1987)).[6] The 1970 Drug Act listed a variety of specific controlled

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punishes "conduct of a nature to bring discredit upon the armed forces." Clause 3 punishes conduct that violates federal laws applicable to civilians. Para. 60(c), *Manual for Courts-Martial, United States—1984* (*Manual*) IV-109 to IV-110.

[5] Article 112a provides that:

> (a) Any person subject to this chapter who wrongfully uses, possesses, manufacturers [*sic*], distributes, imports into the customs territory of the United States, exports from the United States, or introduces into an installation, vessel, vehicle, or aircraft used by or under the control of the armed forces a substance described in subsection (b) shall be punished as a court-martial may direct.
>
> (b) The substances referred to in subsection (a) are the following:
>
> > (1) Opium, heroin, cocaine, amphetamine, lysergic acid diethylamide, methamphetamine, phencyclidine, barbituric acid, and marijuana and any compound or derivative of any such substance.
> >
> > (2) Any substance not specified in clause (1) that is listed on a schedule of controlled substances prescribed by the President for the purposes of this article.
> >
> > (3) Any other substance not specified in clause (1) or contained on a list prescribed by the President under clause (2) that is listed in schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C. 812.)

[6] 21 U.S.C. 802(6) (1982 & Supp. V 1987) defines the term "controlled substance" as "a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter. The term does not include distilled spirits, wine, malt beverages, or tobacco, as those terms are defined or used in subtitle E of the Internal Revenue Code of 1986."

substances (such as heroin, LSD, and marijuana) under five separate schedules (I-V), 21 U.S.C. 812 (1982 & Supp. V 1987), and also gave the Attorney General the authority to designate additional controlled substances, 21 U.S.C. 811 (1982 & Supp. V 1987).

b. In 1984, Congress became concerned about the manufacture of so-called "designer drugs," *i.e.*, drugs that have a slightly different chemical structure than controlled substances, but have the same effect on humans. To combat the proliferation of designer drugs, Congress amended the 1970 Drug Act in two ways. First, Congress authorized the Attorney General temporarily to list controlled substances. 21 U.S.C. 811(h) (Supp. V 1987). Second, Congress modified the 1970 Drug Act in order to treat designer drugs, termed "controlled substance analogue[s]," 21 U.S.C. 802(32),[7] as controlled substances under Title 21. 21

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[7] 21 U.S.C. 802(32) (Supp. V 1987) provides as follows:

(A) Except as provided in subparagraph (B), the term "controlled substance analogue" means a substance—

(i) the chemical structure of which is substantially similar to the chemical structure of a controlled substance in schedule I or II;

(ii) which has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulent [*sic*], depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II; or

(iii) with respect to a particular person, which such person represents or intends to have a stimulent [*sic*], depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II.

(B) Such term does not include—

(i) a controlled substance;

U.S.C. 813 (Supp. V 1987).[8] See *United States* v. *Reichenbach*, 29 M.J. at 131-133 (Pet. App. 14a-19a).

The principal drug at issue in this case is 3, 4-methylenedioxymethamphetamine or MDMA, a designer drug that goes by the street name "Ecstasy." Beginning in January 1984, the Administrator of Drug Enforcement, as the designee of the Attorney General, 28 C.F.R. 0.100(b), sought to list MDMA under 21 U.S.C. 812 (1982 & Supp. V 1987) as a controlled substance. The Administrator temporarily listed MDMA as a controlled substance in May 1985, and issued a final rule on November 13, 1986, listing MDMA as a Schedule I controlled substance. Both actions, however, were later held invalid by the federal courts. The Fifth and Tenth Circuits held invalid the temporary listing of MDMA as a controlled substance, *United States* v. *Caudle*, 828 F.2d 1111 (5th Cir. 1989); *United States* v. *Spain*, 825 F.2d 1426 (10th Cir. 1987), while the First Circuit vacated the final rule listing MDMA as a controlled

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(ii) any substance for which there is an approved new drug application;

(iii) with respect to a particular person any substance, if an exemption is in effect for investigational use, for that person, under section 355 of this title to the extent conduct with respect to such substance is pursuant to such exemption; or

(iv) any substance to the extent not intended for human consumption before such an exemption takes effect with respect to that substance.

[8] The 1986 amendment provided that controlled substance analogues were to be treated as controlled substances "for the purposes of * * * title III as a controlled substance in schedule I." Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, Tit. I, § 1202, 100 Stat. 3207-13. In 1988, the 1970 Act was again amended in order to treat controlled substance analogues as controlled substances for purposes of "any Federal law." Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, Tit. VI, § 6470(c), 102 Stat. 4378 (codified at 21 U.S.C. 813 (1988)).

substance and remanded the rule to the DEA for further consideration, *Grinspoon* v. *DEA*, 828 F.2d 881 (1987). On remand, the Administrator again concluded that MDMA should be listed as a Schedule I controlled substance, effective March 23, 1988. 21 C.F.R. 1308.11(d)(7) (Table). See *United States* v. *Reichenbach*, 29 M.J. at 134 (Pet. App. 20a).

c. The question whether MDMA was a "controlled substance" under Article 112a of the UCMJ, 10 U.S.C. 912a, arose in *United States* v. *Reichenbach*, *supra* (Pet. App. 9a-32a), and the Court of Military Appeals concluded that it was not. The court reasoned that Article 112a(b)(3), 10 U.S.C. 912a(b)(3), applies only to controlled substances "listed" in 21 U.S.C. 812 (1982 & Supp. V 1987), and that, in light of the rulings of the First, Fifth, and Tenth Circuits, MDMA was not "listed" as a controlled substance before March 23, 1988. Moreover, under 21 U.S.C. 802(32)(B)(i) (Supp. V 1987), a "controlled substance analogue" does not include a controlled substance. 29 M.J. at 134-135 (Pet. App. 22a). In addition, prior to the 1988 amendment to the 1970 Drug Act, a "controlled substance analogue" like MDMA was "treated" under 21 U.S.C. 813 (Supp. V 1987) as a "controlled substance" only for purposes of Title 21 of the United States Code, not for purposes of the Uniform Code of Military Justice. 29 M.J. at 135 (Pet. App. 22a-23a); page 7 note 8, *supra*. Accordingly, the Court of Military Appeals held that Article 112a did not make it unlawful to use or distribute MDMA at the time of the offense charged in the *Reichenbach* case (*i.e.*, 1987). 29 M.J. at 135 (Pet. App. 23a-24a).

At the same time, the Court of Military Appeals held in *Reichenbach* that the distribution of MDMA by a servicemember was an offense under Clause 3 of Article 134 of the UCMJ, 10 U.S.C. 934, which permits a servicemember to be charged with any offense in violation of

federal law. Page 4 note 4, *supra*. The court reasoned that 21 U.S.C. 841 (1982 & Supp. V 1987) prohibits the distribution of a "controlled substance," and that 21 U.S.C. 813 (1982 & Supp. V 1987) provided that a "controlled substance analogue" was to be treated as a "controlled substance" for purposes of 21 U.S.C. 841, even in 1987. 29 M.J. at 136 (Pet. App. 26a). The court also concluded that incorporating 21 U.S.C. 813 and 841 (1982 & Supp. V 1987) into Clause 3 of Article 134 was not barred by the so-called "military preemption" doctrine. Under that doctrine, an act that is made a crime by a specific provision of the UCMJ may not be prosecuted under the General Article, Article 134, UCMJ, 10 U.S.C. 934. *Reichenbach*, 29 M.J. at 136-138 (Pet. App. 26a-31a); *United States* v. *Norris*, 2 U.S.C.M.A. 236, 8 C.M.R. 36 (1953). The Court of Military Appeals held that Congress did not intend Article 112a to preempt prosecutions under Article 134 for drug-related crimes that could not be prosecuted under Title 21 of the United States Code. *Reichenbach*, 29 M.J. at 136-137 & n.8 (Pet. App. 27a-28a & n.8) (quoting S. Rep. No. 53, 98th Cong., 1st Sess. 29 (1983)).

3. In this case, petitioner argued that he could not be held liable under Article 112a of the UCMJ, 10 U.S.C. 912a, for the use or distribution of MDMA, because MDMA was not listed under 21 U.S.C. 812 (1982 & Supp. V 1987) as a controlled substance during the period of the charged offenses. Relying on its decision in *United States* v. *Reichenbach*, *supra*, the Court of Military Appeals set aside the specification charging petitioner with the use of MDMA. The court also modified the specification charging petitioner with the distribution of MDMA by changing it from a violation of Article 112a to a violation of Article 134, Clause 3.[9] As modified, the court affirmed the findings of guilt

[9] Because Clause 3 of Article 134 required the government to prove all the elements of 21 U.S.C. 813 and 841 (1982 & Supp. V 1987), and

on the remaining eleven specifications, as well as the sentence. Pet. App. 7a-8a.

ARGUMENT

Petitioner contends that (1) he cannot be convicted of the use and distribution of MDMA under Article 134, UCMJ, 10 U.S.C. 934, since Article 134 is preempted by Article 112a, UCMJ, 10 U.S.C. 912a, and (2) the term "controlled substance analogue" in 21 U.S.C. 813 (Supp. V 1987) is unconstitutionally vague. Those claims do not warrant review by this Court.

1. To begin with, a decision in petitioner's favor would not require that any of his four convictions be set aside. Petitioner was convicted of four charges: Charge 1 alleged that petitioner had used cocaine, LSD, and methamphetamine; Charge 2 alleged in several specifications that petitioner had used or distributed cocaine, LSD, marijuana, and MDMA; Charge 3 alleged that petitioner possessed stolen government property; and Charge 4 alleged that petitioner possessed cocaine. Petitioner's claims do not relate to his convictions on Charges 1, 3, and 4, and petitioner has not challenged his convictions on the specifications in Charge 2 alleging that he used or distributed cocaine, LSD, and marijuana. Petitioner's failure to challenge his convictions under those specifications is significant because it is well settled under military law that a serviceman is guilty of a charge if he is convicted of any supporting specification. Since petitioner has not challenged his convictions on the cocaine, LSD, and marijuana specifications of Charge 2, a ruling in his favor on the MDMA specifications in that charge would not require that his conviction on that charge

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because the government proved that petitioner violated those two laws by convicting him of violating Article 112a, the difference between a conviction based on Article 112a and a conviction based on Article 134 is entirely formalistic.

be set aside.[10] Moreover, in light of the conduct proved in Charges 1, 3, and 4, and in the other specifications of Charge 2, the Court of Military Appeals found that reversing petitioner's conviction on the MDMA specifications of Charge 2 would not lead to a reduction in his sentence. Pet. App. 7a. Under these circumstances, the questions presented in the petition raise only abstract issues of no practical importance to this case.

2. In addition, the questions presented in the petition are of no continuing importance. Both questions involve the relationship between 21 U.S.C. 812 and 813 (1982 & Supp. V 1987), since at the time that petitioner committed the acts charged against him MDMA was a "controlled substance" under 21 U.S.C. 841 (1982 & Supp. V 1987) only because 21 U.S.C. 813 (Supp. V 1987) treated a "controlled substance analogue" as a "controlled substance" for purposes of Title 21 of the United States Code. That is no longer true in the case of MDMA, because MDMA is now specifically listed as a "controlled substance" under 21 U.S.C. 812 (1982 & Supp. V 1987). See 21 C.F.R. 1308.11(d)(7) (Table). Accordingly, the question whether MDMA may be treated as a controlled substance analogue under 21 U.S.C. 813 is not an issue that will arise in future cases.

3. On the merits, petitioner's claims are insubstantial. Although the statutory background to the questions presented is complex, the answers to those questions are not.

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[10] Under military law, a "charge" is different from a "specification." A "charge" identifies the specific UCMJ Article that the accused is alleged to have violated. Rule for Courts-Martial 307(c)(2), *Manual* II-29. By contrast, a "specification" is a "plain, concise, and definite statement of the essential facts constituting the offense charged." Rule for Courts-Martial 307(c)(3), *Manual* II-29. When a defendant is alleged to have committed more than one infraction of the same Article, there will be only one charge, but there will be several specifications

a. Relying on the military preemption doctrine, petitioner argues that the Court of Military Appeals erred in upholding his MDMA conviction under Article 134. Petitioner contends that, by enacting Article 112a of the UCMJ, which specifically focuses on drug offenses, Congress barred the government from charging a servicemember with drug-related crimes under Article 134. The Court of Military Appeals agreed with petitioner that as a general matter Article 112a preempts Article 134 and bars the government from prosecuting drug-related crimes under the latter provision of the Code. The court disagreed with petitioner in this case only because the MDMA charges against him could not be brought under Article 112a at the time he committed the charged offenses, for the reasons that the court gave in its earlier decision in *Reichenbach*. The court concluded in *Reichenbach* that Congress did not intend to leave a gap in the military drug laws that would allow a servicemember in petitioner's position to escape prosecution under the UCMJ altogether. That conclusion is eminently reasonable; it is consistent with the legislative history of Article 112a, see *Reichenbach*, 29 M.J. at 137 n.8 (quoting S. Rep. No. 53, *supra*, at 29) (Pet. App. 28a n.8); and it is correct, even aside from the deference due to the Court of Military Appeals in its construction of the UCMJ, *Middendorf* v. *Henry*, 425 U.S. 25, 43 (1976); *Hiatt* v. *Brown*, 339 U.S. 103, 109 (1950).

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thereunder. Discussion to Rule for Courts-Martial 307(c)(2), *Manual* II-29. A military defendant may be convicted of a charge as long as he is found guilty of one specification, and even if he is acquitted of the remaining specifications. Discussion to Rule for Courts-Martial 918(a)(2), *Manual* II-133 ("Where there are two or more specifications under one charge, conviction of any of those specifications requires a finding of guilty of the corresponding charge. Under such circumstances any findings of guilty as to the other specifications do not affect that charge."). Not

b. Petitioner also claims that the term "controlled substance analogue" in 21 U.S.C. 813 (Supp. V 1987) is unconstitutionally vague. The Court of Military Appeals properly rejected that claim in *Reichenbach*, 29 M.J. at 132 n.5 (Pet. App. 17a n.5), and its decision is consistent with the decision of the only other court of appeals to address this issue, which also rejected a vagueness challenge to 21 U.S.C. 813. *United States* v. *Desurra*, 865 F.2d 651, 653 (5th Cir. 1989). "[V]agueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand." *United States* v. *Mazurie*, 419 U.S. 544, 550 (1975). In this case, the DEA's efforts beginning in January 1984 to list MDMA as a Schedule I controlled substance gave petitioner ample warning that MDMA was an illicit drug. In addition, petitioner knew that MDMA was an illicit drug, as the evidence at trial revealed.[11] Under these circumstances, petitioner's claim that he could not have known that the drug with the street name "Ecstasy" was illegal does not warrant review by this Court.

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[11] Airman Ferkler testified that petitioner gave her some MDMA in April 1986. The following exchange at trial between Airman Ferkler and government counsel shows that petitioner knew that MDMA was an illegal drug, Tr. 158:

Q: Now, I'd like to direct your attention back to the spring of 1986—April, Town Lake—do you recall the accused giving you a drug called ecstacy?

A: Yes, sir.

Q: Can you tell the court what he told you about the drug?

A: He told me that he believed that it was illegal—it was legal prior, and they could sell it over the counter, and that now it was illegal.

Q: Okay, so, his understanding was—it used to be legal, but now it's illegal?

A: Yes, sir.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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